INDEX

	Page
Opinion below	1
Jurisdiction	1
Question Presented	1
Statute Involved	2
Statement	2
Argument	4
Conclusion	7

CITATIONS

Cases:	
Horton v. *United States*, — C. Cls. —, No. 43670, decided May 5, 1941	7
Long v. *United States*, — C. Cls. —, No. 43642, decided May 5, 1941	7
McFeely v. *Commissioner*, 296 U. S. 102	4
McLean v. *United States*, 226 U. S. 374	6
Ralston v. *United States*, 91 C. Cls. 91, certiorari denied, 311 U. S. 687	6, 7
Sweeney v. *United States*, 82 C. Cls. 640	6
Willey v. *United States*, — C. Cls. —, No. 43644, decided May 5, 1941	7
Statutes:	
Act of June 10, 1922, 42 Stat. 625	4, 5
Act of January 30, 1929, c. 123, 45 Stat. 2043	2
R. S. 1603	5
R. S. 1612	5
Miscellaneous:	
Army Pay Tables, January 30, 1931	5
Sen. Rpt. No. 882, 70th Cong., 1st sess	5

410654—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 329

EDWARD A. BLAIR, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions of the Court of Claims (R. 5–6) are not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered May 5, 1941 (R. 7). The petition for a writ of certiorari was filed August 1, 1941. The jurisdiction of this Court is invoked under the provisions of section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether a private act of Congress providing for the retirement of an officer of the Marine Corps

"with the retired pay and emoluments" of the grade in which he was serving authorizes or requires the payment of full rental and subsistence allowances.

STATUTE INVOLVED

The Private Act of Congress of January 30, 1929, c. 123, 45 Stat. 2043, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President is authorized to appoint Edward A. Blair, second lieutenant of the United States Marine Corps and to retire him and place him upon the retired list of the United States Marine Corps with the retired pay and emoluments of that grade.

STATEMENT

The findings of fact of the Court of Claims (R. 3–5) may be summarized as follows:

Petitioner, Edward A. Blair, accepted an appointment as a second lieutenant in the United States Marine Corps on January 22, 1909 (R. 3). On September 11, 1913, he was ordered to appear before a Marine Retiring Board which found him to be incapacitated for active service because of a disease of the spine, and that such incapacity was not the result of an incident of the service (R. 3–4). On October 22, 1913, the President approved the proceedings and findings of the Board and directed that petitioner be wholly retired from the service (R. 4). Petitioner was wholly retired from the

service on October 22, 1913 (R. 4). On January 30, 1929, an Act of Congress was approved which authorized the President to appoint petitioner a second lieutenant of the United States Marine Corps, and to retire him, and to place him upon the retired list of the Marine Corps with the retired pay and emoluments of that grade (R. 4). Pursuant to the authority vested in him by the statute, the President, on February 14, 1929, appointed petitioner a second lieutenant in the United States Marine Corps (R. 4). Petitioner accepted such appointment on February 18, 1929, and on the same day petitioner was placed on the retired list of officers of the United States Marine Corps (R. 4). After retirement, petitioner received the retired pay of an officer of his rank and length of service, but received no rental or subsistence allowances (R. 4).

On August 31, 1937, petitioner brought suit to receive the active-duty allowances of subsistence and rental (R. 1–2). On March 3, 1941, the Court of Claims filed findings of fact and conclusions of law to the effect that the petitioner was entitled to recover (R. 3). On April 7, 1941, on the court's own motion, the special findings of fact, conclusions of law, and opinion entering judgment for the petitioner were vacated and withdrawn (R. 3). On May 5, 1941, the court decided as a conclusion of law that petitioner was not entitled to recover, and entered judgment dismissing the petition (R. 7).

ARGUMENT

The court below decided that the provision of the private act that petitioner be placed upon the retired list with retired pay and emoluments of the grade of second lieutenant did not entitle petitioner to receive the active-duty allowances of subsistence and quarters. We submit that the decision below is correct.

1. Whether or not the word "emoluments" comprehends rental and subsistence allowances depends upon the context in which the word appears. The act which authorized the retirement of petitioner utilizes the clause "retired pay and emoluments." Under ordinary rules of construction, the word "retired" modifies "emoluments" as well as "pay"; and there are no retired subsistence and rental allowances. Admittedly, under the general retirement statutes, rent and subsistence allowances are excluded from the pay due retired officers. The uniform administrative practice has been to consider that the inclusion of the word "allowances" or "emoluments" in a special act providing for retirement does not entitle the beneficiary to any greater amount than is allowed officers retired under the general retirement statutes. Congress must be assumed to have legislated with this administrative interpretation in mind. *McFeely* v. *Commissioner,* 296 U. S. 102, 108. Moreover, the basic policy embodied in the Act of June 10, 1922, 42 Stat. 625, which provides that the pay and allowances of all similarly situated officers in

the uniformed services of the United States should be on a plane of equality, would be violated were officers retired under similarly phrased private acts given a preferred position to those retired under general retirement acts. Nothing in the legislative history of the special act here involved suggests an intent on the part of Congress to grant petitioner such preferred status, but, indeed, that history clearly indicates that payments to petitioner were to be limited to the usual retirement pay.[1]

---

[1] Sen. Rpt. No. 882, 70th Cong., 1st sess., which accompanied the bill, included a letter from the Secretary of the Navy stating that should the bill be passed the cost to the Government would be $1,181.25 annually and the report itself indicates that this was to be the amount received by petitioner upon passage of the bill. The monthly pay, without allowances, of a retired second lieutenant in the Army with over three and less than six years' service is $98.44 (one-twelfth of $1,181.25). Army Pay Tables, War Department, January 30, 1931, page 8. Officers of the Marine Corps are entitled to receive the same pay and allowances as are or may be provided for the officers of like grades in the Infantry of the Army (R. S. § 1612, 34 U. S. C. 971), and the officers in the Marine Corps shall be, in relation to rank, on the same footing as officers of similar grade in the Army (R. S. § 1603, 34 U. S. C. 651). In addition, section 17 of the Pay Act of 1922 provides that on and after July 1, 1922, retired officers shall have their retired pay computed as authorized by law on the basis of pay provided in that Act (i. e., as computed in the Army Pay Tables, *supra*). 42 Stat. 632, 37 U. S. C. 26.

The report also recites that Blair had been retired in 1913 because of a spinal disease which was believed at that time to have been hereditary and that the finding of the retirement board that his physical disability had not been incurred in the line of duty precluded him from being placed upon the retired list and receiving the retired pay to which he would have been entitled had the injury been sustained in the line

2. No conflict exists between the decision below and that of this Court in *McLean* v. *United States,* 226 U. S. 374. The act involved in the *McLean* case was in the nature of a back pay rather than a retirement act. It provided that McLean's widow receive "all back pay and emoluments" which would have been due McLean as a Major between certain dates. Clearly the act there in question comprehended all emoluments and the Court held that such emoluments included certain allowances. The court below in the instant case did not reject that result but simply held that the words "retired emoluments" could be given effect by considering certain perquisites of a retired officer other than allowances for subsistence and quarters. The majority of the court below undertook to distinguish its prior decisions in *Sweeney* v. *United States,* 82 C. Cls. 640, and *Ralston* v. *United States,* 91 C. Cls. 91, certiorari denied, 311 U. S. 687, on the ground that certain perquisites of a retired officer could be considered retired emoluments but not retired allowances.[2]

---

of duty. There was included in the Senate Report a statement by a medical expert, who had examined the clinical notes on the case, that the spinal injury which had caused the retirement of Blair was not and could not have been hereditary. The report stated that the purpose of the special act was to place Blair in the same position as he would have been had the retiring board in 1913 concluded that the injury had been received in the line of duty.

[2] Judges Littleton and Madden concurred in the opinion except in so far as it undertook to distinguish the *Sweeney* and *Ralston* cases. In that respect they adopted the dis-

In the light of the foregoing, we respectfully submit that not only was the decision of the court below correct but that it also would have been justified in proceeding further and overruling its prior decisions in the *Sweeney* and *Ralston* cases.[3]

CONCLUSION

The decision below presents a question of substantially less importance than that in the *Ralston* case in which this Court denied certiorari. The result reached by the court below is correct and as petitioner points out (Pet., p. 7) no conflict either exists or can arise. We respectfully submit, there-

---

senting opinion of Judge Madden in *Long* v. *United States*, —, C. Cls. —, No. 43642, decided May 5, 1941.

[3] In the *Ralston* case the United States filed a petition with this Court asking for writ of certiorari. It pointed out in the petition the reasons which led it to believe that the decision below was erroneous and that the question involved was of sufficient importance to call for a review by this Court. The petition was denied, 311 U. S. 687. In suggesting the desirability of review on the ground of the importance of the question involved, the Government took the position that acts using the expression "retired pay and allowances" and "retired pay and emoluments" were on an equal basis and were equally involved. If this Court concluded that such showing failed to demonstrate the importance of the question, it is suggested that the instant case, which deals only with those acts involving the expression "retired pay and emoluments," is clearly more circumscribed. Petitioner suggests that two other cases are now pending in the Court of Claims involving the same or a similar question (Pet., p. 7), but both of those cases have been decided in accordance with the instant case. *Horton* v. *United States*, — C. Cls. —, No. 43670, decided May 5, 1941, *Willey* v. *United States*, — C. Cls. —, No. 43644, decided May 5, 1941.

fore, that the petition for writ of certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

PAUL A. SWEENEY,
Attorney.

SEPTEMBER 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941